87-1062

NO._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RONALD GREGORY FARAH

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

(Petitioner's Question Restated)

WHETHER THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO DISMISS BASED ON STATE'S FAILURE TO PRESERVE CURRENCY USED IN A "REVERSE-STING" OPERATION, IN VIOLATION OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT, WHERE SUBJECT EVIDENCE WAS NOT THE ONLY EVIDENCE OF PETITIONER'S GUILT.

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OPINION BELOW

The Respondent accepts the Petitioner's statement.

JURISDICTION

The Respondent accepts the Petitioner's statement with one added clarification:

Petition for Certiorari was filed ten days after the time period for filing.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following additions:

A "reverse-sting" operation commenced on April 8, 1984 and culminated on July 10, 1984 with the arrest of Petitioner and five co-conspirators.

The State's case against Petitioner consisted of Petitioner ordering co-conspirator Cortes to accept delivery of three hundred pounds of cannabis, which Cortes did, with the agreement that the additional three thousand seven hundred pounds would be delivered to a ranch in Miami. Petitioner's recorded statements to undercover police, including in part that, "he was part of an organized crime ring," he had been trafficking in drugs for eight years and would purchase five hundred (500)

pounds of cannabis at two hundred and fifty-five ($255) dollars per pound, immediately, from the officer (Appendix 3).

The State confiscated the currency on July 10, 1984 and deposited the same on July 16, 1984. The request for preservation was not made till August 24, 1984 (Appendix 4).

The State offered to stipulate that Petitioner's fingerprints were not on the currency and would make no mention of the fingerprints at trial.

REASON TO DENY THE WRIT

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO DISMISS BASED ON STATES DEPOSITING OF CURRENCY USED IN A "REVERSE-STING" OPERATION SINCE THE MONEY WAS IMMATERIAL TO GUILTY OR INNOCENCE AND EVIDENCE OF PETITIONER'S GUILT WAS OVERWHELMING.

Initially it must be pointed out that Petitioner attempts to mislead this Court by claiming that the currency involved, to wit: forty-eight thousand dollars is the only evidence that establishes Petitioner's guilt. Quite to the contrary, not only is the evidence against Petitioner <u>over-whelming</u>, the subject evidence is not a material element to either of the charged crimes, i.e. Trafficking in Cannabis, and Conspiracy to Traffic. In light of all the evidence against Petitioner which will be presented below, the question before this Court is one that has been asked and answered repeatedly in the past from <u>Brady</u>

v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) to United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985). Does this alleged exculpatory evidence possess the required characteristics of materiality as defined in Bagley, supra and the "uniqueness" as defined in California v. Trombetta, 476 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984)? Respondent would submit that this evidence falls far short of the mark on both requirements.

Petitioner claims that the State withheld evidence from the Petitioner in violation of his constitutional rights as defined by this Honorable Court in Brady, supra. 'Brady evidence' is that which is favorable to the accused and is material to either guilt or punishment. Id. Material evidence has been articulated in Bagley, supra:

> The evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 87 L.Ed.2d 481, 494. The applicability of Brady has been further defined in Trombetta, supra:

> ...evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 81 L.Ed.2d 413, 422.

Under the guidelines formulated in the decisions set forth above, it is clear that the Florida Fourth District Court of Appeal correctly affirmed the trial

court's decision to deny Petitioner's Motion to Dismiss.

The standard of materiality in Bagley, supra makes relevant the question, "what other evidence does the State have"? Patterson v. Black, 791 F.2d 107 (8th Cir. 1986), cert. denied, 107 S.Ct. 890. In Patterson, supra the prosecution failed to disclose the results of a test performed on the victim's keys which were allegedly used to scratch the would-be attacker. The results of the test were negative, meaning no skin or blood was present. .The district court, as well as the Eighth Circuit, citing Bagley, found that there was sufficient incriminating evidence to establish guilt. Id. at 110-111. The negative test results did not explain away the rest of the evidence. Id.

In the case sub judice undercover officers of the Fort Lauderdale Police

Department have Petitioner on tape discussing his organized crime ring and their extensive narcotics activities. Petitioner is on tape telling undercover officers that Petitioner was part of an organized crime ring that could "move" twenty thousand pounds of marijuana per week (Appendix 3). Petitioner stated to undercover officers that he would buy five hundred pounds of marijuana, at a price of two hundred and fifty-five dollars per pound, immediately. Petitioner also stated he had been trafficking in drugs locally for eight years and such information could be verified with any one (Appendix 3-4).

The record contains two depositions of undercover agent Officer Tiderington taken on October 10, 1984 and April 4, 1985. There are taped conversations between the officer and the Petitioner discussing the purchase of four thousand (4,000) pounds of

marijuana with an initial sale of three hundred (300) pounds as a sample. Petitioner ordered one of the co-defendants, Cortes, to accept delivery of the three hundred (300) pounds which in fact Cortes did (Appendix 4). Once the three hundred (300) pounds of marijuana was given to Cortes, the Petitioner instructed the undercover officer to pay off the co-conspirators with Petitioner's money. Petitioner and the co-defendants were then arrested.

A conspiracy consists of an express or implied agreement between to or more persons to commit a crime. Voton v. State, 509 So.2d 1291 (Fla. 4th DCA 1987); United States v. Sopczak, 742 F.2d 1119 (8th Cir. 1984). It is Petitioner's statements to the undercover agents, rather than the money that establishes his guilt. No further acts by Petitioner are required.

LaPolla v. State, 504 So.2d 1353 (Fla. 4th DCA 1987). United States v. Fernandez, 797 F.2d 943 (11th Cir. 1986) ____ U.S. cert. denied, 107 S.Ct. 3230. Petitioner, acting as a broker in a "reverse-sting" operation between undercover agents and potential buyers is guilty of conspiracy. Wiggins v. State, 460 So.2d 483 (Fla. 1st DCA 1984); United States v. Adams, 799 F.2d 665, rehearing denied 812 F.2d 1415, cert. denied, Morrell v.United States, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987).

Trafficking may be similarly proven. Under the Doctrine established in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed.1489 (1946) each member of a conspiracy is criminally liable for any crime committed by co-conspirators during the course of and in furtherance of the conspiracy. Florida courts have upheld the "Pinkerton Doctrine" on numerous occasions,

stating the acts of one co-conspirator are attributable to all. Resnick v. State, 287 So.2d 24 (Fla. 1974). Every act of a co-conspirator is original evidence against each. Damon v. State, 289 So.2d 270 (Fla. 1973). All that is necessary is that the acts be the natural and probable outcome of the common design. Martinez v. State, 413 So.2d 429 (Fla. 3rd DCA 1982). Once a conspiracy is established, an act done by one may be proved against each. Boyd v. State, 389 So.2d 642 (Fla. 2nd DCA 1980). It is a question of fact for a jury to decide whether there exists a conspiracy, and if the act is a natural and probable consequence thereof. Martinez, supra. Once Defendant participated in the conspiracy, he had constructive possession of the contraband found in possession of his co-conspirator. Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1985). Conse-

quently under both Florida and Federal law, there was sufficient evidence to establish Petitioner's guilt apart from the currency.

Whether or not Petitioner's fingerprints are on the money used to purchase the drugs is not important. The absence of his fingerprints would not explain any of his inculpatory statements (most of which are taped) and his actions during the drug buy. Petitioner's fingerprints could very well not have been on the money considering the following: Petitioner had five other co-conspirators; anyone of them or combination of them could have handled the money. Furthermore, Detective Tiderington in his deposition on April 4, 1985 stated that the Petitioner showed him a bag containing money. Therefore Petitioner could have handled the bag only, never touching the currency. Consequently, the lack of his fingerprints on the drug money

could not possibly have underminded the confidence in the outcome. Bagley, supra; Patterson, supra.

Failure to preserve forty-eight thousand ($48,000) dollars in United States currency was not a violation of the Federal Constitution. In Trombetta, supra, this Honorable Court qualified the State's duty to preserve evidence to such evidence that might be expected to play a significant role in suspect's defense. The Court found that the police were acting in good faith and in accord with their normal practice in not preserving breath samples. Id. at 81 L.Ed.2d 413, 422.

The State or the police cannot be expected to preserve every shred of evidence that may be linked to a case. Such a duty is not pratical nor would it preserve the ends of justice. The State in the case sub judice could not have

anticipated the need for preservation because of the previously demonstrated lack of materiality in the evidence. Bagley, Patterson. There is no evidence of any bad faith or conscious effort to circumvent the defense by destroying exculpatory evidence. It's not as if the State tested for fingerprints and then tried to hide inculpatory test results. The money was confiscated on July 10, 1984 and deposited on July 16, 1984. A motion to preserve the money was not filed until some five weeks later on August 24, 1984. (Appendix 4.).

Applying the facts of this case to the two-part test set forth in Trobetta, 81 L.Ed.2d 413, 422, there was no constitutional violation. 1.) The money did not possess any apparent exculpatory value prior to being deposited, since no fingerprint test was ever conducted. Consequently the results of any test would

be mere speculation. 2.) The Petitioner was not only able to obtain but was offered comparable evidence by the State. The State was willing to stipulate that Petitioner's fingerprints were not on the money and would make no mention of any fingerprints on the money during the trial. (Appendix 4).

In United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986), the United States Court of Appeal applied the two-part test of Trombetta, supra to facts similar to the case sub judice. The Government deposited currency allegedly used by the defendants in a crime before the defendant had a chance to conduct an independent test on the money. The Government claims that the scent of cocaine was detected on the currency through a narcotics sniffing dog. The defendant claims he was denied an opportunity to

examine the money himself. The district court and the Court of Appeal found that both parts of the Trombetta test were not met. Respondent would concede that the lack of apparent exculpatory value of evidence is greater when one test has already been conducted by the State and the results are inculpatory. Since no test was conducted at all in the case sub judice the lack of or presence of exculpatory evidence is not as clear. However, since the State was willing to stipulate to the exact evidence sought by the Petitioner, there can be no claim of constitutional error.

In sum this Court has answered the issue presented here numerous times. The trial court and the Florida Fourth District Court of Appeal has decided this case in a manner consistent with these prior decisions. Therefore this Court should not exercise its jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, the State of Florida, Respondent, respectfully requests that the Petitioner's Petition for Writ of Certiorari be denied

Respectfully submitted,
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APPENDIX

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

CASE NO: 84-7580 CF

JUDGE: LAWRENCE L. KORDA

STATE OF FLORIDA :

Plaintiff, :

vs. STATE RESPONSE TO DEFENDANT'S MOTION TO DISMISS

RONALD GREGORY FARAH et. al, :

Defendant. :

COMES NOW MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, by and through his undersigned Assistant State Attorney, and requests this Honorable Court to deny Defendant's Motion to Dismiss and as grounds states:

1. Upon Defendant's arrest July 10, 1984, approximately forty-eight thousand ($48,000) dollars in U.S. currency and approximately three hundred (300) pounds of marijuana were seized by officers of the Fort Lauderdale Police Department.

2. The Defendant was charged with Conspiracy to Traffic in Cannabis over one thousand (1,000) pounds and Trafficking in Cannabis an amount of three hundred (300) pounds.

3. The Defendant, along with co-conspirators met with Fort Lauderdale Police Department officers acting in an undercover capacity in a "reverse-sting" operation, and did then and there conspire, combine, or agree to traffic in cannabis and did possess actually or constructively cannabis in an amount of approximately three hundred (300) pounds.

4. Defendant did conspire, in that he stated to undercover officers with said statements being recorded by a Unitel Device as follows:

a) He was part of an organized crime ring headed by a man named "Paco",

b) That said ring was heavily into drug trafficking,

c) That said ring owned four ranches used for the storage and sale of controlled substances,

d) That said ring could "move" twenty thousand (20,000) pounds of cannabis per week,

e) That said ring would purchase five hundred (500) pounds of cannabis, at a price of two hundred and fifty-five ($255) dollars per pound, from undercover officers immediately,

f) That Defendant had been trafficking in drugs locally for eight (8)

years, and that undercover officers could "check him out" with anyone.

5. That Defendant did order his "man" to cooperate by instructing him to accept delivery of three hundred (300) pounds of cannabis, and co-defendant Cortes did in fact accept delivery.

6. That all monies confiscated during the drug transaction were deposited on July 16, 1984, and the Court order of September 21, 1984, providing for an independent analysis of said monies was impossible to comply with.

7. That the State is willing to stipulate that Defendant's fingerprints were not on said monies and will make no mention of fingerprints being on said monies at trial.

8. That no prejudice has attached to Defendant as a result of his being unable to have said monies independently analyzed.

WHEREFORE, the State respectfully moves this Honorable Court to Affirm the State's information.

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